SUPREME COURT, U. S.
SEP 5 1967
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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1967

## No. 569

CHINA UNION LINES, LTD., a corporation,
*Petitioner,*

vs.

STATES STEAMSHIP COMPANY, a corporation,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals
## for the Ninth Circuit

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## PETITION FOR A WRIT OF CERTIORARI
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Petitioner China Union Lines, Ltd. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in the above entitled case on June 6, 1967.

## OPINIONS OF THE COURTS BELOW

The memorandum opinion of the District Court, printed in Appendix A hereto, *infra*, page i, is reported in 1966 AMC 657. The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix B hereto, *infra*, page vii, is reported in 378 F.2d 356 (9th Cir. 1967). The judgment of the Court of Appeals for the Ninth Circuit is printed in Appendix C hereto, *infra*, page x.

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## JURISDICTION

The jurisdiction of the District Court was invoked by reason of respondent's libel against the petitioner as a result of a maritime collision. 28 U.S.C. 1333. The petitioner filed a cross-libel, invoking the jurisdiction of the District Court pursuant to 28 U.S.C. 1333.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 6, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

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## QUESTION PRESENTED

Is the established principle of general maritime law that a harmed vessel must mitigate damages as a prerequisite to their recovery to be altered for the first time by indirection by United States maritime subsidy law?

## STATUTES INVOLVED

Merchant Marine Act of 1936, 46 U.S.C. Sec. 1101 ff, and particularly portions of 46 U.S.C. Sec. 1176:

> Sec. 1176. Every contract for an operating-differential subsidy under this subchapter shall provide . . . (7) that whenever practicable, the operator shall use only articles, materials, and supplies of the growth, production, and manufacture of the United States, as defined in section 1155 of this title, except when it is necessary to purchase supplies and equipment outside the United States to enable such vessel to continue and complete her voyage, and the operator shall perform repairs to subsidized vessels within the continental limits of the United States, except in an emergency. . . ."

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## STATEMENT OF THE CASE

On August 26, 1960, the MV UNION STAR, owned by petitioner, and the SS ILLINOIS, owned by respondent, collided in the territorial waters of Viet Nam (R. 78). After making temporary repairs, the vessels proceeded on their respective ways. The MV UNION STAR was eventually repaired in Taiwan at a cost of $3,262.75, and the SS ILLINOIS repaired in the United States at a cost of $40,053.60. (Stipulation re Damages, R. 85).

Respondent, owner of the SS ILLINOIS, filed a libel in the United States (R. 3-6) and petitioner filed a cross-libel (R. 14-20). During the course of the hearing before the District Court, petitioner objected to the repair costs to the SS ILLINOIS claimed as damages by respondent and sought to introduce evidence that those repairs could

have been accomplished in Japan for a total cost of $17,222.00 (Tr. 298:7-299:1). Respondent's objection to petitioner's offer of proof was sustained by the District Court on the grounds of "irrelevance" (Tr. 306:5-8). The District Court subsequently found that the terms of the operating-differential subsidy contract with the United States Government under which the SS ILLINOIS was being operated, "required that the ILLINOIS collision repairs be effected in a shipyard in the United States". (Finding of Fact IX, R. 92). Consequently, the District Court allowed respondent to include in its damages the inflated U.S. repair costs. On December 1, 1965 the District Court filed its Final Decree equally dividing damages on this basis and awarding respondent the sum of $20,937.48.[1]

Petitioner sought review of this Decree in the Court of Appeals for the Ninth Circuit. The case was argued and submitted on April 14, 1967. On June 6, 1967, the court below affirmed that the offer of proof was irrelevant.

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[1]The parties stipulated in the District Court that a proportional damage rule was applicable (Finding of Fact VIII, R. 91, 92) but the District Court found the faults to be equal. Although the trial court's decision to divide damages equally was raised on appeal by petitioner, the decision of the Ninth Circuit contains no express ruling on this subject.

## REASONS FOR GRANTING THE WRIT

### I

### THE NINTH CIRCUIT HAS INCORRECTLY INTERPRETED THE SUBSIDY PROVISIONS OF THE MERCHANT MARINE ACT OF 1936 TO ABROGATE THE HISTORIC AND ESTABLISHED PRINCIPLE THAT UNREASONABLE DAMAGE COSTS ARE NOT RECOVERABLE UNDER THE GENERAL MARITIME LAW, A QUESTION NOT PREVIOUSLY REVIEWED BY THIS COURT

#### A. The Merchant Marine Act of 1936 Neither Relieves an Injured Party of Its Obligation to Mitigate Damages nor Serves As a Defense for Failure to So Minimize.

The general maritime law requires that an injured party mitigate its damages as a condition of recovery. *Kossick v. United Fruit Co.* (1961) 365 U.S. 731, 737. That principle reflects the universally accepted tenent of tort law that an injured party has an obligation not to exaggerate but to do everything possible to minimize his damages. American Law Institute, Restatement of Torts, Sec. 918.

Judicial application of the recognized duty of the injured party to mitigate damages recognizes the international character of shipping by finding that a shipowner may only recover the actual costs of repair or replacement parts if obtained in an available world port in which the price is lowest. In *Navigazione Libera T.S.A. v. Newtown Creek Towing Co.* (2d Cir. 1938) 98 F.2d 694, the court held that the shipowner was required to buy a replacement propeller where the market cost was lowest, Trieste and not New York. See also *Zeller Marine Corp. v. Nessa Corp.* (2d Cir. 1948) 166 F.2d 32.

The American shipowner in this action made no effort to refute petitioner's contention that the repair cost of

the SS ILLINOIS incurred in the United States, (which was several times the repair cost available in the Orient (Stipulation Re Damages, States Steamship Co., Item 9, R. 85)) was unreasonable, and that it had failed to mitigate its damages. In response, its sole defense was that its subsidy contract with the United States Government "required" that it repair its vessel in the United States (Tr. 194:1-15; 195:15-25; 303:12; 304:25).

The District Court found that:

> "At all relevant times the SS ILLINOIS was being operated by libelant States Steamship Company under the terms of an operating differential subsidy contract with the United States Government, the terms of which required that the ILLINOIS collision repairs be effected in a shipyard in the United States." (Finding of Fact IX, R. 92).

On that basis the District Court rejected as irrelevant evidence offered to establish both that the costs of repair in the Orient were substantially less than those incurred by the American shipowner in the U.S. and that its recovery should be limited to damages based on the Orient cost figures.

The Court of Appeals affirmed the District Court's decision on the ground that:

> "Had appellee undertaken repair in the Orient, damages would not have been minimized but maximized, taking into consideration the connected loss (possible or probable) of the subsidy revenue." 378 F.2d 357.

Neither court gives any statutory authority for this conclusion. Further, not the place of repair but rather

the measure of damages was at issue. The lower court in holding as it did unwarrantedly overrides an established principle of law, destroys the basis of the divided damages award, and extends the effect of the subsidy scheme under the Merchant Marine Act of 1936 beyond its intended scope, thus presenting a significant question not previously decided by this Court.

**B. The Merchant Marine Act of 1936 Does Not Authorize Imposition of Inflated Damage Costs Upon a Tort-feasor and to Do So Is an Unwarranted Violation of an Established General Maritime Rule of Damages.**

No provision of the subsidy contract or of Title 46 of the United States Code was found by the court below to require U.S. courts to award inflated American repair costs as damages.

The place of repair of the American vessel was never at issue. The question was the measure of the recoverable damages.

The applicable sections of the U.S. Code do not authorize an American shipowner to claim the full amount of its American repair costs as damages and do not suggest that the courts award such excess costs as damages. American courts are not required by the Merchant Marine Act to modify the rule of mitigation of damages and they should not do so.

The question before the court below and the District Court was the measure of damages to be assessed against the petitioner. This question was not answered but rather avoided by discussing the hypothetical loss of subsidy. However, to allow the decision of the lower court to stand will result in the rule that the Merchant Marine Act of

1936 requires American courts to impose inflated American repair cost as damages in contravention of the general maritime law on mitigation of damages.

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## II

### THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT THAT A VOLUNTARY CONTRACTUAL ARRANGEMENT CANNOT IMPOSE UNREASONABLE LIABILITIES UPON A TORT-FEASOR

Mr. Justice Holmes held for the Court in *Robins Dry Dock & Repair Co. v. Flint* (1927) 275 U.S. 303, that:

> ". . . a tort to the personal property of one does not make the tort-feasor liable to another merely because the injured person is under a contract with that other, unknown to the doer of the wrong." 275 U.S. 309.

In *Robins* a time charterer was held to have no right to recover from a dry dock company for damages and delay in use of a vessel as a result of injury to the vessel's propeller during dry docking which was required by the charter party.

The decision in *Robins Dry Dock* reflects the historic rule of *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rept. 145 (1854) that the breaching party cannot be held to damages beyond the reasonable contemplation of the parties to a transaction. That principle is violated by the decision below. The Court offered no rationale, legislative or jurisprudential, for permitting the subsidy arrangement between respondent and the United States to violate established equitable principles. The result is of

tremendous significance to any vessel so unfortunate as to be in collision with a vessel subsidized by the United States.[2]

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## CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

San Francisco, California
August 30, 1967

Respectfully submitted,
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[2]There was no contractual relationship between the parties but, as this Court has emphasized, the full scope of the established admiralty rules of damages must prevail over contrary provisions and the absence of a contractual relationship between the parties is not conclusive in adjudicating their respective rights. *Weyerhaeuser S.S. Co. v. United States* (1963) 372 U.S. 597, 603.

**(Appendices A, B and C Follow)**

## Appendix A

United States District Court, Northern District of California, Southern Division, November 29, 1965.
In Admiralty—No. 28869.

States Steamship Company, *Libellant*,

*vs.*

Steamship *Union Star* and China Union Lines, Ltd., *Respondents.*

(And Cross Libel.)

George B. Harris, D. J.:

Findings of Fact.

I.

The American steamship *Illinois* is a steel-hulled cargo vessel of approximately 7640 gross tons, which, on August 26, 1960, was operated by libellant States Steamship Company, a Nevada corporation.

II.

The Chinese flag vessel *Union Star* is a steel-hulled cargo vessel of approximately 3705 gross tons, which, on August 26, 1960, was owned and operated by China Union Lines, Ltd., a corporation organized under the laws of the Republic of Nationalist China.

III.

On the morning of August 26, 1960, the S. S. *Illinois*, being piloted by Saigon river pilot Phan-Huu Hai, descended the Saigon River from Saigon and after leaving

the Saigon River approached the Kumigawa buoy on course 143° true and when abeam of the buoy, turned south to course 180° true. After rounding the Kumigawa buoy the *Illinois* proceeded south on course 180° true until she was abeam of and approximately one mile off Cape Eperon, at which point course was changed to 150° true and speed reduced to slow ahead at 1128. The *Illinois* continued on course 150° true for about two minutes and then altered course to 145° true at 1130. At 1133 the *Illinois* stopped her engines and thereafter drifted until she was dead in the water at a position about 400 metres northwest of the *Korhyu* wreck buoy, at which position her pilot subsequently disembarked.

IV.

On August 26, 1960, the sea buoy which normally marks the safe and proper course for vessels entering and departing from the harbor was missing. Accordingly, it was necessary for vessels departing the harbor to follow a departure range formed by an imaginary line running from the 164′ knoll adjacent to Nui Ba-Lai, through a point 50 metres off Point Vung, and thence to sea. Before disembarking from the *Illinois* at 1139, Pilot Hai, with Captain Sorensen, drew this departure range on the *Illinois'* chart.

V.

On August 26, 1960, the *Union Star* entered the harbor from sea and at 0745 hours dropped anchor 1.2 or 1.3 miles due east of the Nui Vung Tau Lighthouse and remained anchored until 1136½ or 1137, when, having taken aboard Saigon river pilot Phan-Van-Dy, she heaved

in her anchor and got under way. As she rode at anchor until getting under way the *Union Star's* heading was north northwest. Upon heaving anchor the *Union Star,* being piloted by Pilot Dy, went full ahead on her engines and came to course 348° true and maintained this course for about three minutes, after which she changed course to 353° true. At 1140 the S. S. *Illinois* came full ahead on her engines. While the *Illinois'* precise heading when she got under way is in dispute the court finds that she was headed in a southerly direction, but moments thereafter came left slightly in order to place herself on the departure range line, signalling this slight alteration of course with a two-blast whistle signal. After this two-blast whistle signal was blown by the *Illinois* the *Union Star* blew a one-blast whistle signal, indicating a turn to her starboard. At this point risk of collision was a apparent and was not subsequently avoided, since the *Illinois,* after momentarily stopping her engines, went full ahead and turned hard left while the *Union Star* at 1142 went full astern on her engines, signalling this engine maneuver with a three-blast signal, and continued turning to the right, with the result that both vessels turned toward the east and thereafter collided as they came alongside each other on almost parallel courses. The collision, the precise location of which is in dispute, occurred at 1142½ or 1143 within the territorial waters of South Vietnam.

## VI.

At the time of collision the *Illinois,* although she had men on her foredeck, had no one properly stationed and specifically assigned as a lookout and no one reported the

movements of the oncoming *Union Star* to her master. The court finds that lack of timely and accurate information and knowledge regarding the movements of the *Union Star* contributed to the ensuing collision.

VII.

The S. S. *Union Star,* from the time she got under way until the time of collision, had several men on the forecastle head, but the evidence indicates, and the court so finds, that these men were engaged in heaving in, washing down and securing the anchor and anchor chain. The court finds that there was no one aboard the *Union Star* who was posted and designated as a lookout and functioning as such unencumbered with other duties or responsibilities. No one reported the movements of the *Illinois* to those in charge of the *Union Star's* navigation. The court finds that the absence of timely and accurate information and knowledge aboard the *Union Star* regarding the movements of the *Illinois* contributed to the ensuing collision.

VIII.

The court finds that the faults of each vessel in failing to have a proper lookout, and in all other respects, were equal in degree and contributed in equal degree to the ensuing collision. The law of South Vietnam provides: (1) the navigation of vessels within South Vietnamese waters shall be governed by The International Rules of the Road and (2) that if the faults of vessels in collision are equal in degree, liability for the resulting damage shall be apportioned equally, and (3) if the two vessels are in fault, the liability of each vessel shall be in pro-

portion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.

IX.

At all relevant times the *S.S. Illinois* was being operated by libellant States Steamship Company under the terms of an operating differential subsidy contract with the United States Government, the terms of which required that the *Illinois'* collision repairs be effected in a shipyard in the United States.

X.

That the court finds that as a proximate result of the collision States Steamship Company has sustained allowable damages in the amount of $48,273.09 and respondent China Union Lines, Ltd., has sustained allowable damages in the amount of $6,398.14.

XI.

Respondent China Union Lines conducted an investigation of the collision shortly after it occurred and in July of 1961 security arrangements in the form of letters of undertaking were exchanged between libellant and respondent, which were followed by discussions and negotiations between proctors for libellant and proctors for respondent. In the circumstances the court finds that respondent China Union Lines, Ltd., was not prejudiced by States Steamship Company's delay in filing its libel and that States Steamship Company was not guilty of laches.

## Conclusions of Law.

I.

This court has jurisdiction of the subject matter and the parties.

II.

States Steamship Company has not been guilty of laches.

III.

Both the *Illinois* and the *Union Star* violated Article 29 of The International Rules in failing to maintain a proper lookout.

IV.

Both the *Illinois* and the *Union Star* were equally at fault and the faults of each vessel contributed equally to the collision.

V.

The total damages should be divided and borne equally by libellant and respondent.

VI.

China Union Lines, Ltd., is liable to States Steamship Company in the amount of $20,937.48.

## Appendix B

United States Court of Appeals
For the Ninth Circuit

| | |
|---|---|
| China Union Lines, Ltd., and SS Union Star, Appellants, vs. States Steamship Company, a corporation, Appellee. | No. 20,920 |

June 6, 1967.

Before *Washington, Merrill, and Browning, Circuit Judges.

Washington, Senior Circuit Judge.

In the morning of August 26, 1960, in the mouth of the Saigon River, about one mile from shore, China Union Lines' motor vessel, The Union Star, registered by the Republic of China, was in collision with appellee's steam turbine-driven vessel Illinois, registered by the United States. Each vessel sustained substantial damage. A libel was filed by appellee in 1963 in the District Court for the Northern District of California, a cross-libel was filed by appellants, and the cause was tried in 1965.

The district court found that both vessels failed to maintain a proper lookout, that the lack of timely and accurate

*George T. Washington, Senior Circuit Judge, sitting by designation.

information and knowledge as to the movements of the other vessel on the part of both vessels contributed to the ensuing collision, that both were equally at fault and contributed equally to the collision, and that, in accordance with Vietnam law, the total damages under the International Rules of the Road should be divided equally. A final decree was entered December 1, 1965, holding that the appellee sustained damages from the collision of $48,273.09, that appellants sustained damages of $6,398.14, and that the appellee should recover from the appellants the amount of $20,937.48.

[1, 2] We have reviewed the record and have concluded that the district court's findings are supported by substantial evidence and are not clearly erroneous. It is not our function to weigh the evidence. McAllister v. United States, 348 U.S. 19, 20, 75 S.Ct. 6, 99 L.Ed. 20 (1954); City of Long Beach v. American President Lines (The President Van Buren), 223 F.2d 853, 855 (9th Cir. 1955); Benton v. United Towing Co., 224 F.2d 558 (9th Cir. 1955); Peterson v. United States, 224 F.2d 748, 749 (9th Cir. 1955).

Appellants contend that the district court improperly rejected evidence offered to establish that the costs of repair in the Orient were substantially less than those incurred by appellee in the United States; that appellee was under duty to minimize damages, and should have been limited in its recovery to damages based upon the Orient cost figures.

The district court rejected this offer of proof as irrelevant in light of the fact that appellee's vessel was under

government subsidy, a condition of which requires repair in the United States where conditions permit.

[3] We agree. Had appellee undertaken repair in the Orient, damages would not have been minimized but maximized, taking into consideration the connected loss (possible or probable) of the subsidy revenue.

We do not find any cause for reversal under other contentions made. The district court's judgment will be affirmed.

## Appendix C

United States Court of Appeals
For the Ninth Circuit

| | |
|---|---|
| China Union Lines, Ltd., and SS Union Star, Appellants,<br>vs.<br>States Steamship Company, a corporation, Appellee. | No. 20,920 |

### JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 6, 1967.

SUPREME COURT, U. S.

OCT 2 1967

JOHN F. DAVIS, CLERK

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**No. 569**

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## Brief in Opposition to Petition for Writ of Certiorari

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## Brief in Opposition to Petition for Writ of Certiorari

### COUNTERSTATEMENT OF THE QUESTION PRESENTED

Does the doctrine of avoidable consequences require the owner of a collision-damaged vessel to have repairs performed abroad, rather than in the United States, when to do so would (1) be contrary to national maritime policy, (2) place the vessel owner in breach of its Government subsidy contract, and (3) result in the imposition of a 50 per cent ad valorem duty on the cost of foreign repairs?

## STATUTES INVOLVED

This case involves, in addition to the statute set out in the petition for certiorari, R.S. § 3114, which provides in pertinent part:

> The equipments . . . purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade . . . shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country; and if the owner or master of such vessel shall willfully and knowingly neglect or fail to report, make entry, and pay duties as herein required, such vessel, with her tackle, apparel, and furniture, shall be seized and forfeited. . . . (R.S. § 3114, Ch. 356, Title IV, § 466, 42 Stat. 957 (1922), *as amended,* 19 U.S.C. § 257 (1964).)

## REASONS FOR DENYING THE WRIT

### I. The Ninth Circuit Correctly Decided That Respondent's Decision to Accomplish Repairs to the Illinois in the United States Was Proper.

#### A. REASONABLENESS IS THE STANDARD BY WHICH THE PROPRIETY OF DAMAGE COSTS IS MEASURED.

Petitioner asserts that "unreasonable damage costs are not recoverable under the general maritime law" and that, accordingly, "an injured party has an obligation not to exaggerate but to do everything possible to minimize his damages." (Pet. 5.) The conceptual inconsistency between these assertions is apparent, since there is clearly no equation between what is reasonable and what is possible. Preliminarily, then, it is necessary to correct petitioner's maladroit statement of the rule of damages which it contends is applicable to this case. A lucid statement of this rule and an illustration of its application is found in the decision in *Ellerman Lines, Ltd. v. The President Harding,*

288 F.2d 288 (2d Cir. 1961). In that case two vessels were in collision. On the basis of preliminary information concerning the extent of the damage to the vessel and the consequent hazard to the goods which she carried libelant's personnel made special arrangements for the immediate discharge of certain portions of her cargo, the cost of which was higher than that which would have been incurred had the vessel awaited her regular turn in berth. Although information subsequently became available which indicated that immediate discharge was not necessary the plan was nonetheless carried through. The district court awarded the cost of discharge as part of libelant's damages. On appeal the sole issue raised by respondent was the propriety of the allowance of this item. In holding that under the circumstances libelant's action was proper and that the award was justified Judge Friendly made the following pertinent observations concerning the so-called obligation to minimize damages:

> "It is often said . . . that a tort plaintiff has a 'duty to mitigate damages.' This form of statement has been criticized, . . . probably rightly so since a plaintiff assuredly has no 'duty' in the Hohfeldian sense of the correlative of a right, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 30-32 (1913). The formulation now fashionable is that the defendant is not liable for 'avoidable consequences.' American Law Institute, Restatement of Torts, § 918; McCormick, Damages (1935), p. 128, 2 Harper & James, The Law of Torts (1956), § 25.4. Perhaps as good a way to state the rule as any is that a tort defendant is not liable for consequences preventable by action that reason requires the plaintiff to take; per contra *if the plaintiff takes such action within the range of reason, the defendant is liable for further damages resulting therefrom.* . . .
>
> ". . . It is not fatal to recovery that one course of action, reasonably open but not followed, would have

> avoided further injury whereas another, also reasonable and taken, produced it. 'If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.' McCormick, supra, at p. 134. The standard of what reason requires of the injured party is lower than in other branches of the law." (288 F.2d at 289-90.) (Emphasis added.)

Implicit in the decision of the court below is the holding that under the circumstances the decision by respondent to have repairs to the *Illinois* performed in the United States rather than abroad was a reasonable one.

**B. THE DECISION TO REPAIR IN THE UNITED STATES WAS REASONABLE.**

In enacting the Merchant Marine Act, 1936, Congress declared it "to be the policy of the United States to foster the development and encourage the maintenance of . . . a merchant marine." (Merchant Marine Act, 1936, § 101, ch. 858, § 101, 49 Stat. 1985, 46 U.S.C. § 1101 (1964).) Competition from foreign merchant marines was and remains the chief obstacle to the implementation of this policy. To enable American steamship companies to compete Congress, *inter alia,* passed legislation providing for the payment of an operating differential subsidy through contracts between the Government and properly qualified domestic steamship operators. (*Id.* § 601, ch. 858, § 601, 49 Stat. 2001, *as amended,* 46 U.S.C. § 1171 (1964).) In so doing Congress provided that "every contract for an operating-differential subsidy . . . shall provide . . . that . . . the [steamship] operator shall perform repairs to subsidized vessels within the continental limits of the United States, except in an emergency."*

*Petitioner has abandoned the specious argument which it advanced in the court below to the effect that the repairs made to the *Illinois* were of an "emergency" nature and that foreign repair was therefore permissible. (*See* Appellant's Opening Brief, p. 69.)

(*Id.* § 606(7), ch. 858, § 606(7), 49 Stat. 2004, *as amended*, 46 U.S.C. § 1176(7) (1964).) (The purpose of this provision is obvious: if the United States is to have a viable and independent merchant marine, there must be domestic shipyards capable of maintaining it. Protection from foreign competition is thus needed, and the requirement that subsidized American vessels perform repairs in the United States is one means of affording such protection.)

There is no dispute that respondent here had contracted with the Government for the subsidy authorized by Congress and that the contract contained the required stipulation concerning the performance of repairs in the United States. (*See* Pet. 4.) Petitioner in effect argues that the court below interpreted the relevant provisions of the Merchant Marine Act, 1936 in a manner which abrogates the rule of avoidable consequences. (Pet. 5-7.) This argument neatly circumvents the only issue raised by the avoidable consequences doctrine: Did respondent act unreasonably in accomplishing repairs in the United States, in view of its contract and of the broad purpose of the Merchant Marine Act, 1936? It is apparent that this question must be answered in the negative. If respondent had accomplished repairs abroad, it would have contravened a clearly expressed policy of Congress and breached its own Government contract. That such a breach is viewed by the Government as a serious one is shown by section II-30 of the standard form subsidy contract which provides:

> II-30. *Events of Default.* The following shall constitute events of default under this agreement:
>
> . . . .
>
> (f) Failure by the Operator to comply with any applicable provision of the [Merchant Marine] Act . . . . (Reprinted in Pike & Fischer, Shipping Regulation, Current Service Vol. 3, pp. 160:123-160:124.)*

*In 1964 the Maritime Administration proposed a rule which would have "determined that repairs performed foreign . . . in

What consequences would have ensued from a breach by respondent of its subsidy contract is a moot question, but, in any event, "no one is obliged to take chances in the interest of one who has wronged him." (*Pan-American Petroleum & Transp. Co. v. United States,* 27 F.2d 684, 685 (2d Cir. 1928).)

There was still another factor which influenced respondent's decision to repair in the United States: The cost of foreign repairs would have been subject to an ad valorem customs duty of 50 per cent. (R.S. § 3114, ch. 356, Title 10, § 466, 42 Stat. 957 (1922), *as amended,* 19 U.S.C. § 257 (1964).) The effect of the cited section (quoted *infra* at p. 2) is such that if the cost of foreign repairs exceeds 66⅔ per cent of the cost of comparable repairs in the United States, the imposition of the customs penalty will result in foreign repairs costing more than domestic repairs. For example, in the present case the cost of repairing the *Illinois* in the United States was approximately $40,000. If the cost of foreign repairs had been $26,800, the 50 per cent customs duty would have brought the total cost of foreign repairs to $40,200. Presumably, we would then find petitioner contending that repairs should have been performed in the United States rather than abroad. In any event, the existence of the customs penalty lends additional, if unneeded, weight in support of the reasonableness of respondent's decision to repair in the United States because it substantially reduces (and could altogether eliminate) whatever cost differential may exist between foreign and domestic repairs.

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violation of Section 606(7), Merchant Marine Act, 1936, as amended, and . . . the Company's operating-differential subsidy agreement, shall be subject to the following:

> "(1) An amount equal to the total cost . . . of said foreign repairs . . . shall be deducted from the company's total operating-differential subsidy otherwise accrued." (29 FR 3158 (1964).)

## II. The Decision Below Does Not Conflict with the Decision of This Court in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

In further reiteration (Pet. 8) of its unsupported contention that the cost of repairs made in the United States was an improper measure of damages petitioner relies on the decision in *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927), where Justice Holmes held that time charterers could not recover from a dry dock company for damages and delay in use of a vessel as a result of injury to the vessel's propeller during the semi-annual dry-docking required by the charter party. It is apparent that respondent's position is not analogous to that of the time charterers in *Robins,* as petitioner suggests, but rather to that of the vessel owner. It is undeniably the law that a recoverable item of collision damage is the loss of hire suffered by a vessel in collision whose charter is interrupted. (*United States v. Panama Transp. Co.,* 174 F. Supp. 592 (S.D.N.Y.), *aff'd per curiam,* 268 F.2d 739 (2d Cir. 1959).) Moreover, the question decided in *Robins* was not the amount of damages to which time charterers were entitled, but whether their libel against the dry dock company stated a cause of action.* Finally, it is apparent that there is little similarity between a Government contract executed pursuant to, and designed to implement, national maritime policy and an ordinary, private commercial contract. The decision in *Robins* is thus clearly inapposite to the question raised here by petitioner.

Petitioner also relies upon *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rep. 145 (1854), and then is forced to concede its inapplicability to the present case because there is "no

*"The question is whether respondent [time charterers] have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter." (275 U.S. at 308.)

contractual relationship between the parties. . . ." (Pet. 10, n. 2.)* Contrary to the rule expressed in that decision (which limits contract damages to those within the reasonable contemplation of the parties), the rule is well established in tort cases that even though the tort-feasor neither foresaw nor should have foreseen the extent of damage caused the injured party this fact does not prevent him from being liable for the full amount of the injured party's damages. (See Restatement (Second) of Torts §§ 435, 454 (1965).)

### III. The Question Presented Does Not Merit This Court's Attention.

None of the criteria for the granting of certiorari set forth in Rule 19 of this Court's Rules is satisfied here. Viewed in any reasonable perspective the question whether the rule concerning avoidable consequences should be applied so as to preclude the award of part of respondent's damages is not a matter of such national, maritime or commercial significance as to merit the attention of this Court. The question is a simple, narrow one which was adequately and correctly dealt with by the courts below. It is not a

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*Petitioner also cites *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597 (1963), for the proposition that "the full scope of the admiralty rule of damages must prevail over contrary provisions and the absence of a contractual relationship between the parties is not conclusive." (Pet. 9, n. 2.) In *Weyerhaeuser* this Court held that a private vessel owner was entitled to recover as part of collision damages from the United States sums paid in settlement of a personal injury claim made by a Civil Service worker employed on the Government vessel involved, notwithstanding the fact that the employee had received compensation under the Federal Employee's Compensation Act, stating that "the full scope of the divided damages rule must prevail over a statutory provision which, like the one involved in the present case, limited the liability of one of the shipowners with respect to an element of damages incurred by the other in a mutual fault collision." (372 U.S. at 603.) The point decided in *Weyerhaeuser* has no application here, even as distorted by petitioner.

question of such complexity or importance that the aid of this Court should be required.

## CONCLUSION

The arguments presented by petitioner not only are clearly lacking in substantive merit, but also fail to pose an issue of importance sufficient to justify the granting of a writ of certiorari. The petition should therefore be denied.

San Francisco, California
September 30, 1967

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, GRAYDON S. STARING, certify as follows:

I am a member of the Bar of the Supreme Court of the United States. I represent respondent States Steamship Company in the above entitled matter, in whose behalf service of the foregoing Brief has been effected as herein stated.

I certify that on or before September 30, 1967, I served the foregoing Brief in Opposition to Petition for Writ of Certiorari by service of three (3) copies upon the attorney for Petitioner, by mailing the same at San Francisco, California, postage prepaid, first class mail, as follows:

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